IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SOURCEONE GLOBAL PARTNERS, LLC, **Plaintiff,** **v.** **KGK SYNERGIZE, INC.,** **Defendant.**	)	**Magistrate Judge Schenkier** **Case No.: 08 CV 7403**
KGK SYNERGIZE, INC., **Counterclaim-Plaintiff and Third-Party Plaintiff,** **v.** **SOURCE ONE GLOBAL PARTNERS, LLC, d/b/a SOURCEONE GLOBAL PARTNERS, d/b/a SOURCE ONE GLOBAL PARTNERS, LLP, and f/k/a SOURCE ONE GLOBAL, LLC,** **Counterclaim-Defendant** **and** **JESSE LOPEZ,** **Third-Party Defendant.**	)	

MEMORANDUM OF LAW IN SUPPORT OF THIRD PARTY DEFENDANT JESSE LOPEZ'S MOTION TO DISMISS KGK SYNERGIZE, INC.'S THIRD PARTY COMPLAINT PURSUANT TO RULE 12(B)(6)

Third-Party Defendant Jesse Lopez ("Jesse Lopez" or "Lopez") submits this memorandum of law in support of his motion, pursuant to Rule 12(b)(6), to dismiss KGK

Syngerize, Inc.'s ("Third-Party Plaintiff" or "KGK") Third Party Complaint against him, stating as follows:

PRELIMINARY STATEMENT

In a transparent and unwarranted ploy to put pressure on Plaintiff SourceOne Global Partners, LLC ("SourceOne"), its members and officers, KGK has sued SourceOne's President and Chief Executive Officer, Jesse Lopez, personally, contending without any foundation that Lopez is merely the alter-ego of SourceOne and thus personally liable for SourceOne's alleged acts and omissions. KGK's baseless claims against Jesse Lopez must fail because KGK has failed to plead facts sufficient to justify the drastic remedy of piercing SourceOne's corporate veil. As a result, the entirety of KGK's Third Party Complaint should be dismissed for failure to state a claim upon with relief can be granted. Alternatively, even assuming, *arguendo*, that KGK adequately pled facts sufficient to pierce the corporate veil of SourceOne under Rule 8(a)(2), Jesse Lopez may not be held individually liable with respect to Counts III or IV of the Third Party Complaint because those claims sound in fraud, and KGK has failed to plead supporting facts with the particularity required by Rule 9(b). Finally, Count VI for breach of contract against Jesse Lopez should be dismissed for failure to state a claim because Lopez was not personally obligated on the provision of the contract that KGK claims was breached.

BACKGROUND

On December 29, 2008, SourceOne filed this lawsuit against KGK in response to KGK's threats and accusations that SourceOne was infringing KGK's patent and trademark rights. (Doc. # 1.) SourceOne's Complaint seeks, among other things, declarations that the patents and trademarks at issue are not infringed and/or are invalid. Id. On February 28, 2009, KGK filed an

Answer, Affirmative Defenses and Counterclaims to SourceOne's Complaint (and moved to dismiss Counts V and VI relating to one of the patents-in-suit). (Doc. ##28-30.)

Then, on March 3, 2009, KGK filed a Third Party Complaint against the President and Chief Executive Officer of SourceOne, Jesse Lopez. (Doc. #36.) The Third Party Complaint alleges seven counts against Lopez -- which are essentially identical to seven of the counts of KGK's Counterclaims against SourceOne -- on the unsupportable theory that SourceOne is merely Jesse Lopez's alter ego and that, accordingly, the corporate veil of SourceOne should be pierced in order to hold Jesse Lopez accountable for SourceOne's alleged acts and omissions. KGK's Third Party Complaint, however, fails to state a claim upon which relief can be granted against Jesse Lopez. Accordingly, it should be dismissed.

ARGUMENT

I. KGK FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED TO PIERCE SOURCEONE'S CORPORATE VEIL

Ordinarily, a plaintiff in a suit in Federal Court need not plead detailed facts, and conclusions may be pleaded as long as the defendant is provided at least minimum notice of the claim. *See* Fed. R. Civ. P. 8(a)(2). However, "a plaintiff can plead himself out of court by alleging facts, which show that he has no claim, even though he was not required to allege those facts." Jackson v. Marion County, 66 F.3d 151, 153 (7th Cir. 1995) (citations omitted). Allegations in a complaint are binding admissions, and admissions can "admit the admitter to exit from the federal courthouse." *Id.* at 154 (citation omitted). That is precisely what has occurred here, as KGK's own Third Party Complaint demonstrates that it cannot state a claim against Jesse Lopez.

Under Illinois law, "[t]he general rule is that a corporation is an entity separate and distinct from its officers, shareholders and directors and that [those officers, shareholders and directors] will not be held personally liable for the corporation's debts and obligations." Melko v. Dionisio, 580 N.E.2d 586, 594 (Ill.App.3d 1991) (citation omitted). A court cannot disregard the corporate form unless the plaintiff shows "(1) there is such a unity of interest and ownership that separate personalities of the corporation and the individual no longer exist; and (2) circumstances are such that adhering to the fiction of a separate corporate existence would promote injustice or inequity." Id. (citation omitted).

Here, KGK has failed, as a matter of law, to allege facts showing that there is such a unity of interest and ownership between Jesse Lopez and SourceOne that separate identities no longer exist between them. In support of its "alter ego/veil piercing" theory, KGK first alleges that Jesse Lopez is the founder, president and CEO of SourceOne. Third Party Complaint, Doc. #36, ¶¶ 17, 18. The Third Party Complaint further states that Jesse Lopez dominates and controls SourceOne. Third Party Complaint, Doc. # 36, ¶ 19. Illinois Courts, however, have held, as a matter of law, that conclusory allegations of this nature are inadequate to pierce the corporate veil. *See* Melko, 580 N.E.2d at 595. In Melko, the plaintiff alleged that defendant was the sole or primary shareholder of Consumer Systems Corporation ("CSC") and sought to have the Court pierce the corporate veil of CSC. Id. at 595. The Court rejected the plaintiff's argument, holding that "the mere allegation that [defendant] was a dominant or sole shareholder is insufficient to enable a court to disregard the separate corporate existence." Id. (citation omitted).

In another attempt to state facts sufficient to pierce the corporate veil of SourceOne, KGK alleges that Jesse "Lopez has used SourceOne and fictitious names and entities such as 'Source One Global Partners, LLP' interchangeably with SourceOne." Third Party Complaint, Doc. #36, ¶ 20. In Steele v. GE Money Bank, 2009 WL 393860 (N.D. Ill. Feb. 17, 2009), attached as **Exhibit 1** hereto, this Court considered a similar allegation. Specifically, Steele made several factual allegations in an attempt to assert an alter ego theory of liability, including that GE Money Bank used a trade name. Id. at *7. The Court held that alleging the use of a trade name is inadequate to support a right to relief based on the alter ego theory, and dismissed the claims. Id. Accordingly, KGK's allegation that SourceOne may have operated under a trade name provides no support for its contention that SourceOne is Jesse Lopez's alter ego.

In a last ditch attempt to plead specific facts showing SourceOne is Jesse Lopez's alter ego, KGK alleges that KGK's auditor, PriceWaterhouse Coopers, was told by SourceOne's office manager that certain "accounting information" was at the home of Jesse Lopez, where his wife "prepared" it. Third Party Complaint, Doc. #36, ¶ 22. This allegation spectacularly fails to demonstrate the unity of interest such that "separate personalities of the corporation and the individual no longer exist" as required by Illinois law. If it were otherwise, then every company employee who brought work home and enlisted the aid of his or her spouse could be subject to personal liability for all of his or her company's actions on an alter ego theory. Such an allegation simply is insufficient to suggest that Jesse Lopez and SourceOne operate as a single entity, as is required to survive a motion to dismiss. Steele, 2009 WL 393860, at *7 ("[T]o survive a motion to dismiss a claim based on an alter ego theory, a complaint must 'fairly allege[] an entity exists as the alter ego of another' and ***point to facts suggesting that the entities operate as a single entity***") (quoting Flentye v. Kathrein, 485 F. Supp.2d 903, 912 (N.D. Ill. 2007)) (emphasis added). KGK has failed to satisfy this burden.

Moreover, KGK has failed to even attempt to plead facts meeting the second element required to disregard the corporate form, namely, that "circumstances are such that adhering to the fiction of a separate corporate existence would promote injustice or inequity." Melko, 580

N.E.2d at 594; *see also* Tome Engenharia E. Transporrtes, Ltd. v. Malki, 1996 WL 172286, *5 (N.D. Ill. April 11, 1996), attached as **Exhibit 2** hereto ("To hold the Malkis liable as the alter-ego of IMG, Tome also must allege facts sufficient to establish that adherence to the fiction of separate identities would sanction a fraud or promote injustice"). The Third Party Complaint is silent with respect to meeting this requirement, which, as the case law makes clear, is far from nominal. As this Court held in Tome:

> Although the "promote injustice" test requires something less than an affirmative showing of fraud, it requires something more than the mere prospect of an unsatisfied judgment. Id. at 522-23. "[C]ourts that properly have pierced corporate veils to avoid 'promoting injustice' have found that, unless [they] did so, some 'wrong' beyond the creditor's inability to collect would result." Id. at 524. That is, "some element of unfairness, something akin to fraud or deception, or the existence of a compelling public interest must be present in order to disregard the corporate fiction."

Id. (quoting Sea-Land Services, Inc. v. Pepper Source, 941 F.2d 519, 522-524 (7th Cir. 1991) and Pederson v. Paragon Pool Enterprises, 574 N.E.2d 165, 169 (Ill. App. 1991)). Because KGK has not even sought to allege "circumstances are such that adhering to the fiction of a separate corporate existence would promote injustice or inequity" (nor could it reasonably do so), its Third Party Complaint must be dismissed.

In Bell Atlantic Corp v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1966 (2007), the United States Supreme Court demonstrated the importance of dismissing claims on the basis of inadequate pleading, holding that "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be…be exposed at the point of minimum expenditure of time and money by the parties and the court." The Supreme Court went on to emphasize the district court's role in the process, "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to succeed." Id. The Supreme Court further observed that, on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." Id. at 1965. Of particular significance to the instant case, Twombly requires that the "allegations [of a Complaint] ***must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a 'speculative level'; if they do not, the plaintiff pleads itself out of court***." E.E.O.C. v. Concentra Health Services, Inc., 496 F.3d 773, 776 (7th Cir. 2007) (quoting Twombly, 127 S. Ct. at 1965, 1973, n. 14) (emphasis added); accord, Steele, 2009 WL 393860, at *2.

In the instant case, KGK's attempts to show that it has a right to relief against Jesse Lopez personally -- as opposed to whatever rights it may have against SourceOne, the company of which he is the President and Chief and Executive Officer -- completely fail to raise such possibility above a "speculative" level. KGK's attempts to show a unity of interest and ownership such that "separate personalities of the corporation and the individual no longer exist" are unavailing, and it does not even attempt to meet its heavy burden of demonstrating that "circumstances are such that adhering to the fiction of a separate corporate existence would promote injustice or inequity." In sum, KGK's allegations are "simply not enough to plausibly suggest that [KGK] ha[s] a right to relief based on an alter ego theory." Steele, 2009 WL 393860, at *7 (citing Twombly, 127 S. Ct. at 1964). Accordingly, because KGK fails to allege facts that show it is entitled to pierce the corporate veil of SourceOne (nor will it be able to do so), this Court should dismiss KGK's Third Party Complaint against Jesse Lopez with prejudice for failure to state a claim upon which relief can be granted.

II. COUNTS III AND IV SHOULD BE DISMISSED FOR THE ADDITIONAL REASON THAT KGK FAILS TO PLEAD VEIL PIERCING ACTIVITY WITH THE PARTICULARITY REQUIRED BY RULE 9(B)

Even if this Court were to find that KGK has met its burdens with respect to pleading alter ego liability as to Counts I, II, V, VI, and VII of the Third Party Complaint, this Court should dismiss Counts III and IV of KGK's Third Party Complaint because these claims are not pled with the particularity required by Federal Rule of Civil Procedure 9(b). In alleging fraud or mistake, a party must state with particularity the circumstances constituting the fraud or mistake. Fed. R. Civ. P. 9(b). The Illinois Supreme Court defines fraud as "anything calculated to deceive, whether it be a single act or combination of the circumstances, whether the suppression of truth or the suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or by silence, by word of mouth or by look or gesture." Strohmaier v. Yemm Chevrolet, 211 F. Supp.2d 1036, 1043 (N.D. Ill. 2001) (quoting Regenold v. The Baby Fold, Inc., 369 N.E.2d 858 (Ill. 1977)). In asserting that Jesse Lopez violated the Lanham Act through SourceOne's actions in Counts III and IV, KGK contends that the alleged acts are "likely to cause confusion, deception, and the mistaken belief among consumers that the products sold as Cholesstrinol were made by, authorized by, sponsored by, and/or affiliated with KGK." Third Party Complaint, Doc. #36, ¶¶ 46, 55, 56. Accordingly, the allegations that Lopez is using SourceOne as his alter ego to violate the Lanham Act must be pled with particularity.

As settled law confirms, if a plaintiff attempts to establish that a defendant used an alter ego to perpetrate a fraud, the plaintiff must plead the facts required to show the necessity of piercing the corporate veil with sufficient particularity as required by Rule 9(b). *See* U.S. v. All Meat and Poultry Products Stored at Lagrou Cold Storage, 470 F. Supp.2d 823, 832-833 (N.D. Ill. 2007). In Typographics Plus, Inc. v. I.M. Estrada & Co., Inc., the plaintiff alleged that the defendant, Bill Horty, was using I.M. Estrada & Co., Inc. as his alter ego in order to defraud plaintiff. 2000 WL 1006572, at *1 (N.D. Ill. July 19, 2000), attached as **Exhibit 3**. The plaintiff alleged three causes of action including breach of contract, common law fraud and consumer fraud. Id. at *2. The plaintiff also asked the court to pierce the corporate veil of Estrada & Co. in order to hold Horty individually liable. Id. at *3. In its complaint, the plaintiff made conclusory allegations that Estrada & Co. was thinly and under-capitalized, did not possess assets to fulfill its obligations, and that Horty operated Estrada as a shell to further his fraudulent schemes. Id. at *5. In ruling on Horty's motion to dismiss, this Court held that the common law fraud and consumer fraud claims against Horty would be dismissed because the plaintiff failed to plead the veil piercing allegations with sufficient particularity, as required by Rule 9(b). Id. The Court further held that the plaintiff alleged no facts to show that unless the court held Horty individually liable, it would be sanctioning fraud or injustice. Id.

In the instant case, KGK fails to plead facts supporting its purported entitlement to pierce SourceOne's corporate veil and hold Jesse Lopez personally liable with the particularity required by Federal Rule of Civil Procedure 9(b). KGK alleges that Jesse Lopez is the founder of SourceOne, dominates and controls its finances, and, at one point, had SourceOne accounting information at his home prepared by his wife. Third Party Complaint, Doc. #36, ¶¶ 17-26. KGK fails to allege any specific, concrete allegation of Jesse Lopez using SourceOne as his alter ego to perpetrate fraud. Rule 9(b) requires that KGK plead the specific activity as well as the time and place of the activity performed by Jesse Lopez that merits piercing the corporate veil. Strohmaier, 211 F. Supp.2d at 1044 (N.D. Ill. 2001). As was the case in Typographics, KGK again fails to allege facts to show that, unless the court holds Lopez individually liable, it will be sanctioning some fraud or injustice.

For the additional, and independently sufficient, reason that KGK's Third Party Complaint fails to plead the required elements for piercing the corporate veil with particularity as required by Rule 9(b), this Court should dismiss Counts III and IV against Jesse Lopez.

III. KGK FAILS TO STATE A BREACH OF CONTRACT CLAIM AGAINST JESSE LOPEZ IN COUNT VI

KGK fails to state a breach of contract claim against Jesse Lopez in Count VI because Source One, the corporation, and not Jesse Lopez as an individual, was obligated under the cited contractual provision. In Count VI, Third-Party Plaintiff quotes paragraph 7 of the December 18, 2007 Minutes of Settlement at issue ("Settlement Agreement"), which provides:

> Source One will not retain any inventory of Sytrinol after the date of termination of the License Agreement, subject to Source One's right to complete delivery on sales of Sytrinol booked prior to the termination date provided that no such delivery may take place more than 90 days following the termination date. Source One will otherwise be responsible for all obligations under any third party agreements, which it has in effect.

Third Party Complaint, Doc. #36, ¶ 77 (quoting Settlement Agreement, a true and correct copy of which is attached as **Exhibit 4** hereto, ¶ 7).

This specific contractual obligation applies to Source One, and not Jesse Lopez. *See* id. As noted above, well-settled case law holds that corporate officers are generally not liable for the obligations of the corporation. Tome, 1996 WL 172286, at *3 (citing Ted Harrison Oil Co. v. Dokka, 617 N.E.2d 898, 901 (Ill. App. 1993) and McCracken v. Olson Cos., 500 N.E.2d 487, 490 (Ill. App. 1986)) (holding that "a corporation is a legal entity that exists separate and apart from its shareholders, directors, and officers, who are not generally liable for the corporation's debts and obligations"). Although Jesse Lopez signed the Settlement Agreement both in his individual capacity and his capacity as an officer, the specific provisions in that agreement that apply to Jesse Lopez in his individual capacity are clearly set forth in the agreement. *See, e.g.,* Settlement Agreement at ¶¶ 8, 9. The provision that serves as the basis for KGK's Count VI is not one of them. Jesse Lopez has no individual contractual obligation to return inventory of

Sytrinol, and therefore, cannot be held individually liable for such obligation. Despite KGK's apparent belief, Jesse Lopez plainly did not sign the Settlement Agreement as a guarantor.

Because the contractual provision relied upon as the basis of Count VI of KGK's Third Party Complaint clearly applies to SourceOne and not Jesse Lopez, this Court should dismiss Count VI for failing to state a breach of contract claim against Lopez.

CONCLUSION

For the foregoing reasons, Jesse Lopez respectfully requests that this Court dismiss KGK's Third Party Complaint in its entirety and for such other and further relief as the Court deems just and proper.

LIST OF EXHIBITS

Exhibit 1: Steele v. GE Money Bank, 2009 WL 393860 (N.D. Ill. Feb. 17, 2009).

Exhibit 2: Tome Engenharia E. Transporrtes, Ltd. V. Malki, 1996 WL 172286 (N.D. Ill. April 11, 1996).

Exhibit 3: Typographics Plus, Inc. v. I.M. Estrada & Co., Inc., 2000 WL 1006572 (N.D. Ill. July 19, 2000).

Exhibit 4: Settlement Agreement, Dated December 18, 2007

Respectfully submitted,

POLSINELLI SHUGHART PC

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent Notice of Electronic Filing to the following:

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